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No. 82-1642

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES L. DRURY, DRURY INDUSTRIES, INC., THE MAY DEPARTMENT STORES COMPANY, WEST PARK ASSOCIATES, MAY CENTERS OF CAPE, INC., MAY CENTERS, INC., and the CITY OF CAPE GIRARDEAU, MISSOURI,

Petitioners,

v.

WESTBOROUGH MALL, INC., GEORGE STAPLES, JR., and WESTBOROUGH MALL ASSOCIATES,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT E. MANLEY
[Counsel of Record]
ANDREW S. LIPTON
Manley, Jordan & Fischer
4500 Carew Tower
Cincinnati, OH 45202
Telephone: (513) 721-5525

(Counsel continued on inside cover)

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

ROBERT H. FREILICH
MARTIN L. LEITNER
Freilich & Leitner
210 Plaza Bank & Trust Bldg.
Kansas City, MO 64112
Telephone: (816) 753-8885

JAMES R. ROBISON
200 West North Street
Sikeston, MO 63801
Telephone: (314) 471-5583
Attorneys for Respondents

OF COUNSEL:

Joseph R. Jordan
Timothy A. Fischer
Timothy M. Burke
Jeffrey J. Harmon
William A. McClain

4500 Carew Tower
Cincinnati, Ohio 45202

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The judgment of the Eighth Circuit which petitioners seek to have overturned merely reverses a summary judgment entered by the District Court on a record abundant with evidence from which inferences and conclusions in favor of Plaintiffs could be drawn. The Court of Appeals neither departed from well settled standards of review

approved by this Court nor announced new legal principles. Such a judgment presents no question deserving of review by this Court.

Petitioners have urged this Court to review the evidence on the record to determine whether summary judgment in their favor should have been allowed to stand. They do so by presenting three questions, each of which is hypothetical and requires resolution in their favor of controverted facts and conflicting inferences. Their statement of the case portrays their embellished treatment of the record; however, the evidence is more fairly presented in the opinion of the Court of Appeals than in the petition.

Petitioners seek to create questions of importance by ignoring the basic character of this case, a factual dispute for which summary judgment is inappropriate. The Court of Appeals held that the District Court erred in its judgment because it made "a choice of inferences to be drawn from the subsidiary facts," *United States* v. *Diebold*, 369 U.S. 654, 655 (1962), "a choice which is impermissible on a motion for summary judgment." (A-14) Petitioners make the same error in their statment of the case and subsequent discussions of fact.

STATEMENT OF THE CASE

Petitioners' discussion of the history of Westborough Mall, respondents' development, reflects conclusions drawn from a biased opinion. They have drawn their inferences from the conflicting subsidiary facts, weighed evidence, questioned credibility, and have been extremely selective in what to present to this Court. The Court of Appeals properly concluded that a genuine factual issue existed as to the viability of respondents' mall. (A-14) Deposition

testimony and documents gave substantial support to the conclusion that respondents were unable to attract major tenants and to secure additional financing because the zoning had been illegally reverted in deliberate coincidence with the granting of the requested zone change to the competing West Park developers. (A-14)

Petitioners' discussion of the West Park Mall development is equally deceiving. It omits any reference to the preferential treatment afforded the West Park developers (A-17), to the numerous private meetings between the city officials and petitioners (A-17), to the assurances given months or years before any applications were even filed that zone changes would be granted (A-17 - A-18), and to the various anticompetitive, predatory tactics employed by the West Park developers to construct the sole regional shopping mall in the city. (A-21)

Finally, petitioners' portrayal of the reverter issue is characteristically misconceived. The analysis by the Court of Appeals as to the genuine issues of material fact found in the record is totally ignored. Petitioners neglected to present the facts which show that the acts taken by the city to deprive respondents of their C-4 planned commercial zoning for over a year and a half were pursuant to official policy. (A-13)

Instead, the record supports a finding that the city manager, after conferring with the city attorney, ordered the city engineer to alter the official zoning map of the city to reflect a reversion of respondents' zoning to prior (non-commercial) classifications. (A-12) The city manager, the chief executive officer of the city, also directed that no building permit be renewed or issued to respondents. These directions were carried out by the city engineer. (A-12) The city manager then informed city council in writ-

ing that respondents' zoning had been automatically reverted and that a reverter provision of the city would be applied to respondents' property unless and until the city manager was ordered otherwise by city council or a court. Council discussed the issue but took no action whatsoever, other than to disparage respondents and their zoning status to the news media. (A-9, A-12 - A-13) Thus virtually every city official was involved in the decision to automatically revert respondents' zoning without notice or a hearing.

The Court of Appeals recognized that these acts of the city officials "were not merely isolated incidents . . . but rather may have represented the official policy of the city concerning the status of plaintiffs' zoning." (A-13, citations omitted) Clearly, we do not have here a random, unauthorized deviation from procedure.

Petitioners also argue that the reversion of respondents' zoning had no effect on the development of respondents' mall even though the appellate court recognized that the reversion became a "cloud" on the zoning status of their property, as a result of which respondents were unable to attract major tenants or additional financing or even sell their leasehold. (A-14 - A-15)

This is clearly a case where summary judgment was reversed simply because there were genuine issues of material fact in the record; the writ should be denied.

REASONS FOR DENIAL OF WRIT

As is quite evident from petitioners' brief, the three questions presented for review all turn upon whether there was sufficient evidence in the record to withstand a motion for summary judgment. The Court of Appeals, after reviewing a three-volume appendix in excess of 900 pages, concluded that summary judgment was inappropriate because of the existence of genuine issues of material fact. (A-2 - A-3)

This Court has often recognized that a writ of certiorari should not be granted "merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 164, 165 (1924), ("The argument developed that the controverted question was whether the evidence sufficed . . . primarily a question of fact;" writ dismissed as improvidently granted); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), ("We do not grant a certiorari to review evidence and discuss specific facts"). Petitioners, however, are seeking just such an evidentiary review.

A second reason for denial of the writ is based upon the present procedural posture of this case. The Court of Appeals resolved none of the ultimate factual or legal questions but merely found that the record established genuine issues of material fact rendering summary judgment inappropriate. To reach this conclusion the Court properly applied the standard of review enunciated in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-89 (1968), (sufficient evidence of a factual dispute to require a resolution at trial of differing versions of the truth) and *Adickes* v. *S. H. Kress & Co.*, 398 U.S.

144, 152 (1970), (absence of genuine issue as to any material fact and evidence must be viewed in light most favorable to opposing party). See also *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

Finally, no "special and important reasons" single this case out from the myriad of petitions presented annually to this Court. The wrongdoings involved here were episodic and would not lead to a decision of precedential value to the public or legal community. Sup. Ct. R. 17; *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951); *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

A brief review of the facts and legal issues involved here establishes the absence of any question worthy of this Court's consideration.

There is evidence in the record of an unlawful conspiracy sufficient to withstand summary judgment.

Petitioners argue that the Court of Appeals found a genuine issue of material fact as to the existence of a conspiracy merely on the basis of evidence of an opportunity to conspire. This view of the appellate court's deciscion and the record is deceiving. The District Court concluded that respondents were "unable to unearth a shred of evidence" of conspiracy. (A-33) The Court of Appeals reviewed the entire record and reversed this erroneous conclusion, finding "sufficient evidence of a possible conspiracy to illegally revert plaintiffs' zoning to withstand a motion for summary judgment." (A-17) [1]

[1] Petitioners once again challenge documents relied upon below on the ground that they were improperly authenticated. Petitioners do not question the authenticity of the documents, only the method of

Contrary to petitioners' characterization of the appellate court's decision, evidence of more than a mere opportunity to conspire was looked for, and found, in the record. Summary judgment was deemed improper because the court found evidence of motive to conspire,[2] opportunity to conspire,[3] and overt acts consistent with the inference of a conspiracy.[4] There clearly is sufficient evidence of an

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authentication. The petitioners produced the exhibits in response to specific requests for production of documents; each exhibit, introduced by affidavit, was identified as to source. This is adequate evidence of authenticity, particularly when coupled with the nature and contents of the documents (e.g. some are signed or on letterheads while others are city ordinances or similar public documents). See e.g., *Alexander Dawson, Inc.* v. *N.L.R.B.*, 586 F.2d 1300 (9th Cir. 1978). Furthermore, statements made by defendants are excluded from the definition of hearsay (Fed. R. Evid. 801(d)) while business records are admissible as exceptions to the hearsay rule (Fed. R. Evid. 803 (6)). The Court of Appeals ruled that "the documents are sufficiently reliable for us to determine whether the record as a whole supports the District Court's decision in this case." (A-6) The District Court also ruled that it considered "all the evidence submitted". (A-6, A-32) Thus petitioners' attack on the evidence should once again be rejected.

[2] The West Park developers viewed respondents' project as a potential threat, particularly since the market could support only a single regional shopping center. (A-15, A-17) The city may have desired to get a particular department store, affiliated with petitioners, to come to the city but had been told it would only go to the West Park Mall; the city may have also been seeking a particular right-of-way owned by one of the West Park developers. (A-19)

[3] The Court focused upon the close relationship between petitioner Drury and city officials. (A-17) There were numerous private meetings between the West Park developers and city officials. After one such meeting the West Park developers were assured C-2 zoning while after a subsequent meeting a West Park developer wrote that they had gotten tacit city approval for the ultimately desired zoning in exchange for a right-of-way. (A-7, A-17 - A-18)

[4] One of the West Park developers edited the city manager's report to City Council (A-7 - A-8), deleting references to their fear of disruptive lawsuits which could be better handled after the C-4 zoning

illegal agreement to render summary judgment inappropriate (A-19 - A-20, A-24) and to meet the standard for proving conspiracy established in *American Tobacco Co.* v. *United States,* 328 U.S. 781, 810 (1946), and *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 152 (1970).

The record supports the conclusion that petitioners were not entitled to summary judgment on the basis of Noerr-Pennington immunity.

Petitioners argue that the Court of Appeals misconstrued and misapplied the *Noerr-Pennington*[5] doctrine so as to "scuttle" the immunity. To create this issue petitioners have taken the decision of the Court of Appeals out of context and mis-stated the facts in the record so as to distort the holding which was based on the unique facts of this case.

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was granted. The West Park developers sought "C-2 zoning per Lawley [City Manager] schedule" (A-7), and were generally afforded preferential treatment. (A-17) The notes of one of the petitioners evidenced their fear of respondents' progress, stating that "Staple - trouble - attack zoning" and "stop them from building so we maybe get a chance to build" (which, as the Court of Appeals noted, is what occurred just two months after the note was written). (A-8) The timing of the reverter itself, announced two days after the initial West Park zone change but two years after the time the automatic reverter would have gone into effect, also supports the inference of conspiracy (A-19), as does the fact that the City Manager informed the West Park developers within days of his official actions to revert respondent's property (and the impact on respondents so as to preclude development was noted) even though respondents were never notified by the city until the city manager wrote to respondents' financier three months later to tell him of the zone change. (A-9 - A-10)

[5] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington,* 381 U.S. 657 (1965).

The Court of Appeals simply held that petitioners "*may* not be protected by *Noerr* because their legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions." (A-22, emphasis supplied.) Citing its earlier decision in *Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980), the Court noted that "actions beyond 'traditional political activity' may not be protected by the *Noerr* exemption." (A-22)

The Court, after discerning reliable evidence of conspiracy between the West Park developers and city officials, did not deprive petitioners of *Noerr* immunity merely on the basis of the participation of city officials in the conspiracy. Rather, the Court went further and also required proof of illegal or fraudulent acts, specifically finding evidence that the West Park developers "achieved their 'monopoly' through 'exclusionary, unfair, or predatory means.' " (A-21, fn 7, citations omitted) The Court focussed on the facts supporting an inference of an unlawful agreement to illegally revert respondents' zoning and recognized that the petitioners were not entitled to protection due to their involvement in what the court described as "a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property." (A-23)

This inquiry as to whether there was a "legitimate use of the political process" (A-22), is consistent with this Court's analysis in *Noerr*. There, anticompetitive motives and resulting restraints of trade were held not to be Sherman Act violations because "valid governmental action" was solicited. 365 U.S. at 136, 139. See also *U.S.* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 560 (1939), (otherwise valid act and order with monopolistic effect not violative of Sherman Act).

The Eighth Circuit's approach here fits precisely within the principles recognized in *Noerr*, 365 U.S. at 144, and in other cases such as *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). The Court of Appeals simply denied summary judgment based on *Noerr* because there was evidence of illegal acts to solicit unlawful, constitutionally infirm governmental action so as to directly injure respondents. Thus the Eighth Circuit decision is in no way at odds with *Noerr* or its progeny. The principle followed here is consistent with precedent and a workable, proper standard.

The Court of Appeals correctly found genuine issues of material fact as to the existence of constitutional deprivations.

Petitioners state that respondents' sole allegation of a 42 U.S.C. § 1983 civil rights violation was a deprivation of procedural due process and that there was neither a deprivation of property nor any lack of due process because respondents ignored state law post-deprivation options. Neither the District Court nor the Court of Appeals accepted petitioners' argument that no due process violation had been made out. (A-2) The argument certainly does not warrant the attention of this Court.

Petitioners rely on *Parratt* v. *Taylor*, 451 U.S. 527 (1981), to attack the Eighth Circuit's decision. In *Parratt*, this Court held that a random, unauthorized, tortious loss of property caused by the negligence of a state employee, for which a meaningful pre-deprivation hearing could not be provided, could be properly redressed through a State Court tort action. However, in *Parratt*, and again in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), this court has emphasized that the Fourteenth Amendment requires that there be an opportunity to be heard at a meaningful time and in a meaningful manner. In

Parratt, a post-deprivation remedy was sufficient; in *Logan* it was not. Obviously, the nature of the property interest and the circumstances of the deprivation are determinactive. *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1, 12 (1979), ("It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands' . . . ." (citations omitted).[6]

In the case at hand, not only would a pre-deprivation hearing have been possible, practical, and meaningful, but one was in fact required by both the state zoning enabling legislation and the city's own zoning code (requiring notice and a hearing prior to any rezoning). In spite of these clear dictates, and respondents' specific exemption from the city's reverter provision, the city "automatically"

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[6] Respondents' property interests here are two-fold: (1) the right to maintain their zoning status unless and until changed in a lawful manner, with notice and a hearing; and (2) the right to develop and use their leasehold in a reasonable, feasible manner without losing the fair market value of the land. Both interests were pleaded and argued. (Paragraphs 14 and 15 of Amended Complaint. A-11 - A-15)

The circumstances surrounding the deprivation here are totally different from those in *Parratt.* Here, virtually every city official was involved in the decision to automatically, without notice or hearing, revert respondents' zoning. (A-12 - A-13) This was not a random, unauthorized, negligent act of a single city employee. As the Court of Appeals noted:

> "The actions by city officials in this case were not merely isolated incidents, . . . but rather may have represented the official policy of the city concerning the status of plaintiffs' zoning. . . ." (A-13, citations omitted)

Petitioners' reliance on *Greenholtz* is misplaced because the question there involved "purely subjective appraisals" as to the advisability of granting parole, 442 U.S. at 10, while the present matter concerns the need for "[p]rocedures designed to elicit specific facts," 442 U.S. at 14, that is, the inapplicability of the city's reverter provision, a purely objective question.

reverted respondents' zoning. Under these circumstances, where time was of the essence due to the fierce competition between respondents and petitioners, a state-law post-deprivation process could not satisfy the due process clause of the Fourteenth Amendment.[7]

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[7] Petitioners have mis-stated the record by arguing respondents used their due process claim as a means of "bootstrapping their way into the federal court under the Civil Rights Act." Actually, respondents filed this action in state court and later amended their petition to join civil rights with state tort claims when the later proved to be inadequate. At that time petitioners removed this case to federal court.

CONCLUSION

Petitioners have failed to present a question deserving of review by the Supreme Court of the United States. The Eighth Circuit Court of Appeals, applying traditional legal principles, simply reversed a summary judgment because the record contained genuine issues as to material facts. The writ of certiorari should be denied.

ROBERT E. MANLEY
[Counsel of Record]
ANDREW S. LIPTON
Manley, Jordan & Fischer
4500 Carew Tower
Cincinnati, OH 45202
Telephone: (513) 721-5525

ROBERT H. FREILICH
MARTIN L. LEITNER
Freilich & Leitner
210 Plaza Bank & Trust Bldg.
Kansas City, MO 64112
Telephone: (816) 753-8885

JAMES R. ROBISON
200 West North Street
Sikeston, MO 63801
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Attorneys for Respondents

OF COUNSEL:
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